

14
No. 2588

United States
Circuit Court of Appeals

For the Ninth Circuit.

M. A. MILLER, Collector of Internal Revenue of
the United States for the District of Oregon,
and DAVID M. DUNNE,

Plaintiffs in Error,

vs.

SNAKE RIVER VALLEY RAILROAD COM-
PANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Oregon.

Filed

APR 17 1915

F. D. Monckton,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

M. A. MILLER, Collector of Internal Revenue of the
United States for the District of Oregon, and
DAVID M. DUNNE,

Plaintiffs in Error,

vs.

SNAKE RIVER VALLEY RAILROAD COM-
PANY, a Corporation,

Defendant in Error.

Names and Addresses of the Attorneys of Record.

CLARENCE L. REAMES, United States Attorney,
and EVERETT A. JOHNSON, Assistant United
States Attorney, Portland, Oregon, for the
Plaintiffs in Error.

W. W. COTTON, A. C. SPENCER, and W. A. ROB-
BINS, Wells Fargo Building, Portland, Oregon,
for the Defendant in Error.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 6338.

SNAKE RIVER VALLEY RAILROAD COM-
PANY, a Corporation,

Plaintiff,

vs.

M. A. MILLER, Collector of Internal Revenue of the
United States for the District of Oregon, and
DAVID M. DUNNE,

Defendants.

Citation on Writ of Error.

United States of America,
Ninth Judicial Circuit,—ss.

To Snake River Valley Railroad Company, a Corporation, Plaintiff Above Named and Defendant in Error, and to Attorneys for said Railroad Company, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the District Court of the United States, for the district of Oregon, wherein the above-named defendants M. A. Miller, Collector of Internal Revenue of the United States, for the District of Oregon, and David M. Dunne, are plaintiffs in error, and the Snake River Valley Railroad Company, a corporation, is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf. [1*]

WITNESS, the Honorable R. S. BEAN, District Judge of the United States at Portland, within said circuit, this 15th day of March, 1915.

R. S. BEAN,
United States District Judge. [2]

United States of America,
District of Oregon,—ss.

Service of the foregoing citation on writ of error,

*Page-number appearing at foot of page of original certified Record.

by receipt of copy thereof duly certified to by E. A. Johnson, Attorney for the above-entitled defendants, together with similar copy of petition for writ of error, order allowing writ of error, assignment of errors, and writ of error, is hereby admitted at Portland, Oregon, this 15th day of March, 1915.

W. A. ROBBINS,

Of Counsel for Snake River Valley Railroad Company, Defendant in Error. [3]

[Endorsed]: No. 6338. In the District Court of the United States for the District of Oregon. Snake River Valley Railroad Company, a Corporation, Plaintiff, vs. M. A. Miller, Collector of Internal Revenue of the United States, for the District of Oregon, and David M. Dunne, Defendants. Citation on Writ of Error. Filed March 15, 1915. G. H. Marsh, Clerk. [4]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6338.

SNAKE RIVER VALLEY RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

M. A. MILLER, Collector of Internal Revenue of the United States for the District of Oregon, and DAVID M. DUNNE,

Defendants.

Writ of Error.

United States of America,
Ninth Judicial District,—ss.

The President of the United States, to the Honorable
Judges of the District Court of the United
States, for the District of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the above-entitled District Court, and before you, or some of you, between the Snake River Valley Railroad Company, a corporation, plaintiff, and M. A. Miller, Collector of Internal Revenue of the United States, for the District of Oregon, and David M. Dunne, defendants, a manifest error has happened to the great damage of the said defendants as by their petition and assignment of error hereinbefore filed, we being willing that error, if any has been, should be duly corrected and full and speedy [5] justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then and under your seal distinctly and openly, you send the record and proceedings, aforesaid, with the things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in said Circuit on the 1st day of April, 1915, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings, aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done

therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 15th day of March, A. D. 1915.

[Seal].

Attest: G. H. MARSH,
Clerk of the District Court of the United States for
the District of Oregon. [6]

[Endorsed]: No. —. In the United States Circuit Court of Appeals for the Ninth Circuit. Snake River Valley Railroad Company, a Corporation, Plaintiff, vs. M. A. Miller, Collector of Internal Revenue of the United States, for the District of Oregon, and David M. Dunne, Defendants. Writ of Error. Filed March 15, 1915. G. H. Marsh, Clerk United States District Court, District of Oregon. [7]

*In the District Court of the United States for the
District of Oregon.*

March Term, 1914.

BE IT REMEMBERED, That on the 6th day of March, 1914, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint, in words and figures as follows, to wit:
[8]

*In the District Court of the United States for the
District of Oregon.*

No. 6338.

SNAKE RIVER VALLEY RAILROAD COM-
PANY, a Corporation,

Plaintiff,

vs.

M. A. MILLER, Collector of Internal Revenue of the
United States for the District of Oregon, and
DAVID M. DUNNE,

Defendant.

Complaint.

Comes now the Snake River Valley Railroad Com-
pany, the plaintiff above-named, and for cause of
action against the above-named defendants, alleges:

I.

That the plaintiff on and prior and subsequent to
June 27, 1911, was a corporation duly organized and
existing under the laws of the State of Oregon, and
the owner of a line of railroad extending from Wal-
lula, Washington, in a general northeasterly direc-
tion to the town of Grange City in said State.

II.

That the defendant, M. A. Miller, was on and sub-
sequent to August 16, 1913, and is now the duly ap-
pointed and acting Collector of Internal Revenue of
the United States for the District of Oregon; and that
defendant, David M. Dunne, was prior to August 16,
1913, the duly appointed and acting Collector of In-
ternal Revenue of the United States for the District
of Oregon.

III.

This plaintiff herein on the 29th day of June, 1907, leased to The Oregon Railroad and Navigation Company its entire railroad and all property connected therewith, and same was turned [9] over to the Oregon Railroad and Navigation Company and since said date has been operated by The Oregon Railroad and Navigation Company and its successor in interest, the Oregon-Washington Railroad & Navigation Company; and the plaintiff has not since said date carried on any business in connection with the operation of said railroad and has not been engaged in doing or carrying on any business whatsoever, except the business of owning the property, maintaining the investment, collecting the income and dividing it among its stockholders.

IV.

That notwithstanding the fact that the plaintiff has not since June 29, 1907, been engaged in or doing business in any manner whatsoever, except as above set forth, the defendant, David M. Dunne, as Collector of Internal Revenue of the United States for the District of Oregon, wrongfully and illegally exacted and collected from the plaintiff, under color of the provisions of Section 38 of an Act of Congress of the United States, approved August 5, 1909, entitled, "An Act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes," and demanded and required the plaintiff to involuntarily and under duress and compulsion pay to him on the 27th day of June, 1911, as Collector of Internal Revenue of the United

States for the District of Oregon, the sum of \$870.70, as special excise taxes for the year ending June 30, 1911. That at said time and place plaintiff served written notices upon defendant, David M. Dunne, that said payment was made under duress and compulsion and under protest, solely for the purpose of avoiding the imposition of the penalties in said act provided, and the restraint of its goods, chattels and effects, reserving all its rights to recover said amount so illegally and erroneously assessed and collected, and that the assessment of said tax was illegal and void as against the plaintiff.

V.

That thereafter and on the 2d day of May, 1913, the plaintiff [10] herein presented and delivered to David M. Dunne, as Collector of Internal Revenue of the United States for the District of Oregon, for transmission to the Commissioner of Internal Revenue of the United States at Washington, D. C., its appeal to said commissioner in the form and manner required by law, and the regulations of the secretary of the treasury of the United States, established in pursuance thereof. That thereafter and on or about the 26th day of June, 1913, said Commissioner of Internal Revenue and defendant, David M. Dunne, as collector, notified this plaintiff that it would be necessary for the claimant to furnish additional information in connection with said application for refund; that thereafter the plaintiff complied with said request and furnished said additional information to David M. Dunne, as collector, and to the Commissioner of Internal Revenue; and thereafter and

on or about the 21st day of November, 1913, said Commissioner of Internal Revenue rejected and disallowed said appeal. And said defendant, M. A. Miller, as Collector of Internal Revenue, and defendant, David M. Dunne, as former Collector of Internal Revenue, to whom said money was paid, by reason of the disallowance and rejection of said appeal and application for refund by the Commissioner of Internal Revenue, refused and still refuse to refund to this plaintiff the whole or any part of said taxes so wrongfully and illegally exacted and collected from this plaintiff.

WHEREFORE, plaintiff demands judgment against the defendants for the sum of Eight Hundred Seventy and 70/100 (780.70) Dollars, together with interest thereon from June 27th, 1911, and for its costs and disbursements herein.

W. W. COTTON,
A. C. SPENCER,
W. A. ROBBINS,

Attorneys for Plaintiff. [11]

United States of America,
District of Oregon,
County of Multnomah,—ss.

J. P. O'Brien, being first duly sworn, on oath deposes and says: That he is vice-president of the Snake River Valley Railroad Company, the plaintiff herein; that he has read the foregoing complaint, knows the contents thereof, and the same is true as he verily believes.

J. P. O'BRIEN.

Subscribed and sworn to before me this 6th day of March, A. D. 1914.

[Seal]

T. M. SCOTT,

Notary Public for Oregon.

Filed March 6, 1914. A. M. Cannon, Clerk. [12]

And afterwards, to wit, on the 5th day of June, 1914 there was duly filed in said court and cause an Answer, in words and figures as follows, to wit:
[13]

Come now the above-named defendants and for their answer to the complaint of plaintiff hereinbefore filed, admit, deny and allege as follows:

I.

Answering paragraph one of plaintiff's complaint, defendants admit that on and prior and subsequent to June 27, 1911, plaintiff was a corporation duly organized and existing under the laws of the State of Oregon; and defendants admit that on and for some years prior to the date of December 23, 1910, said plaintiff corporation was the owner of the line of railroad in said paragraph one of said complaint described, but defendants deny each and every other allegation in said paragraph one contained.

II.

Answering paragraph two of plaintiff's complaint, defendants admit the allegations contained therein and all thereof. [14]

III.

Answering paragraph three of plaintiff's complaint defendants admit that on the date therein al-

leged, plaintiff leased to the Oregon Railroad and Navigation Company, upon the terms and conditions in said lease stated, its said entire railroad and all its property connected therewith and with the operation thereof, as is more fully set forth in said lease, a copy of which said lease from plaintiff to said the Oregon Railroad and Navigation Company, with related notices and agreement for the termination thereof, is hereto attached and marked Exhibit "A," and by reference thereto hereby made a part hereof; and defendants admit that said railroad and property in said lease described, was turned over to the Oregon Railroad and Navigation Company, and since said date and until the sale thereof, has been operated by the Oregon Railroad and Navigation Company and by its successor in interest, the Oregon-Washington Railroad & Navigation Company, under and according to the terms of said lease and not otherwise, and after said sale of said property, operated by said companies as owners; and defendants admit that since said date of June 29, 1907, and until said railroad and property was sold by plaintiff, plaintiff was carrying on the business of owning said property, maintaining its said investment therein, collecting the income therefrom and dividing it among its stockholders, but defendants deny each and every other allegation in said paragraph three contained.

IV.

Answering paragraph four of plaintiff's complaint, defendants admit that the defendant, David M. Dunne, as Collector of Internal Revenue of the

United States for the District of Oregon, exacted and collected from the plaintiff under color of the provisions of Section 38 of the Act of Congress of the United States approved August 5, 1909, entitled "An Act to provide revenue, equalize duties and encourage the industries of the [15] United States and for other purposes," and demanded and required the plaintiff to involuntarily pay to him on said 27th day of June, 1911, as Collector of Internal Revenue of the United States for the District of Oregon, the sum of \$870.70 as special excise taxes for the year ending December 31, 1910; and defendants admit that at said time and place, plaintiff served written notice upon defendant David M. Dunne, that said payment was made under duress and compulsion and under protest, and for the purpose of avoiding the imposition of the penalties in said act provided, and the restraint of its goods, chattels and effects, reserving all its right to recover said amount so assessed and collected, but defendants deny that plaintiff has not since June 29, 1907, been engaged in or doing business in any manner whatsoever, except as in plaintiff's complaint thereinbefore set forth; and defendants further deny that the said tax so by said defendant Dunne assessed and collected from plaintiffs, was for the year ending June 30, 1911, or for any year other than the year beginning January 1, 1910, and ending December 31, 1910; and defendants further deny that the said tax so by the said defendant Dunne assessed and collected from plaintiff, was wrongfully or illegally or erroneously assessed or collected, and deny that the assessment of said tax

was illegal or void as against this plaintiff as is by plaintiff alleged in said paragraph four of said complaint.

V.

Answering paragraph five of plaintiff's complaint, defendants admit every allegation therein contained, and the whole thereof, except that portion of said paragraph five contained in line 4 of page 4 of said complaint, wherein the taxes therein mentioned are referred to and alleged to have been "wrongfully and illegally" exacted and collected from plaintiff, but defendants deny that the collection of said tax and taxes, and the taxes so assessed, is in any manner wrongful or illegal as alleged in said paragraph five, but was and is in all respects rightful and in accordance with law. [16]

VI.

Further answering the complaint of plaintiff, defendants allege that at all times subsequent to date of January 1, 1910, and to and including the 23d day of December, 1910, plaintiff corporation was the owner of the line of railroad described in plaintiff's complaint, together with the rolling stock and other equipment necessary to the ordinary operation thereof, and maintained the general offices of said corporation in the city of Portland, Oregon; that during all of said times and dates, plaintiff maintained its corporate existence by the holding of stockholder's meetings, and the election thereat, and appointment thereafter to its various offices, of corporate directors and officers; that during said time between dates of January 1, 1910 and December 23,

1910, the business of said corporation done and transacted by it and by its said officers and assistants, was that of owning the said property and maintaining its investment therein, and of collecting the income and rents therefrom, of the transfers of stock of said corporation, and the management of the finances and invested funds thereof; that in the course of the business of said corporation of maintaining its said investment, it became and was necessary and required of plaintiff, by and under the terms of said lease in paragraph three of this defendant's answer referred to, and said plaintiff corporation did at various times between said dates of January 1, 1910 and December 23, 1910, expend, for the improvement and betterment of plaintiff's said railroad, and the construction in connection therewith by plaintiff company, through the agency of its said lessee, of new warehouse, railroad tracks, and other railroad tracks connecting plaintiff company's line with the line and road of the North Coast Railroad Company, and for a stock and cattle passageway thereunder or thereover, sums aggregating as defendants believe and allege, the amount of Nine Hundred and fifty-five and 78/100 Dollars, and which said warehouse track and connecting track and cattle passageway were, between said dates of January 1, 1910 and December 23, 1910, so by plaintiff constructed.

[17]

VII.

That between said last mentioned dates of January 1, 1910 and December 23, 1910, it was determined by the stockholders and officers and di-

rectors of plaintiff corporation that the property and railroad of plaintiff should be sold and the said lease theretofore made for same, cancelled; that on the said 23d day of December, 1910, and in the course of the business of plaintiff and as a part thereof, the said lease was by plaintiff cancelled and the said railroad, equipment and other property of said plaintiff corporation was on said date, by plaintiff sold and conveyed to the Oregon-Washington Railroad and Navigation Company and the proceeds of such sale, in the amount of Two Million, Two Hundred and Sixty-five Thousand (\$2,265,000) Dollars, were on said date of December 23, 1910, received by plaintiff; that thereafter and prior to the first day of January, 1911, and in the course and as a part of plaintiff company's said business, plaintiff company, out of the proceeds of the said sale of its said property, paid its total bonded indebtedness, in the amount of One Million Five Hundred Thousand (\$1,500,000) Dollars, and retired the bonds representing the same; and that thereafter and prior to the first day of January, 1911, and in the course and as a part of plaintiff company's said business, plaintiff company, out of the proceeds of the said sale of its said property, repaid to the Union Pacific Railroad Company, construction advances in the total amount, as defendants believe and allege, of Nine Thousand Four Hundred and Sixty and $22/100$ (\$9,460.22) Dollars; and that thereafter and prior to the first day of January, 1911, and in the course and as a part of plaintiff company's said business, plaintiff company, out of the proceeds of said sale of its said property, repaid to the Oregon

Railroad and Navigation Company, construction advances in the total amount, as defendants believe and allege, of One Thousand One Hundred and Forty-three and $85/100$ (\$1,143.85) Dollars; and that during the said year [18] ending December 31, 1910, plaintiff corporation did in the course of its said business, pay to the Secretary of State of the State of Oregon, its annual corporate license taxes required by law, and that in the maintenance of its said offices and in the transaction and doing as aforesaid of its said business, plaintiff corporation carried an account and accounts with one or more banks and banking houses in said city of Portland, making deposits of money from time to time therein and drawing its checks thereon and generally during said time doing all such acts and things as are usually and necessarily incident to the transaction of such business of plaintiff corporation as is hereinbefore alleged and set forth.

VIII.

That at all the times between said dates of January 1, 1910, and December 31, 1910, plaintiff corporation was one organized for profit and doing business as hereinbefore alleged in the States of Oregon, Washington and Idaho, and having a corporate stock represented by shares, and was not a labor, agricultural or horticultural organization or fraternal beneficiary society, order or association operating under the lodge system and providing for the payment of life, sick, accident, or other benefits to the members of such society, order or association, and to dependants of such members; nor a domestic building and

loan association, organized and operated exclusively for the benefit of its members; nor a corporation nor an association organized and operated exclusively for religious, charitable or educational purposes; that on or before the first day of March, 1911, as required by law, plaintiff corporation filed with defendant Dunne, its written return showing a net income during the said year ending December 31, 1910, of the sum of \$92,070.00; that thereafter said defendant Dunne as Collector of Internal Revenue of the United States for the District of Oregon, assessed to plaintiff corporation, a tax of one per cent of all of said annual net income over and above the sum of Five Thousand Dollars [19] and in the amount as in plaintiff's complaint alleged, of \$870.70, and that the said tax so by defendant Dunne assessed to and collected from plaintiff, was and is the tax mentioned in plaintiff's complaint and the tax for which recovery is therein sued; and that all of the acts and things done by the said plaintiff corporation in the said transaction of its said business as hereinbefore in this answer alleged, were done by plaintiff in accordance with the plaintiff's corporate rights and charter powers and privileges; and each and every thereof were within the corporate power granted by the State of Oregon to plaintiff in its said charter.

WHEREFORE, defendants having fully answered the complaint of plaintiff, pray that the said complaint may be dismissed, with the costs to defendants.

E. A. JOHNSON,

Assistant United States Attorney and Attorney for
Defendants. [20]

United States of America,
District of Oregon,—ss.

I, M. A. Miller, being first duly sworn do on oath depose and say that I am one of the defendants in the within-entitled action; that I have read the foregoing answer and know the statements therein made and contained, and that the same are true as I verily believe.

Dated at Portland, Oregon, this 5th day of June, 1914.

M. A. MILLER.

Subscribed in my presence and sworn to before me by the above-named M. A. Miller, this 5th day of June, 1914.

[Seal]

EVERETT A. JOHNSON,
Notary Public for Oregon. [21]

[Exhibit "A" to Answer—Lease, etc.]

THIS INDENTURE, made and entered into this 29th day of June, 1907, by and between THE SNAKE RIVER VALLEY RAILROAD COMPANY (hereinafter called the "lessor"), an Oregon corporation, of the first part, and THE OREGON RAILROAD & NAVIGATION COMPANY (hereinafter called the "lessee"), an Oregon corporation, of the second part,

WITNESSETH: That, in consideration of the mutual undertakings and agreements hereinafter contained, the parties hereto have undertaken, covenanted and agreed, and do hereby undertake, covenant and agree, to and with each other as follows, that is to say:

FIRST: The lessor hereby leases to the lessee, its successors and assigns, from the first day of July, 1907, for the term of five years then next ensuing, the railroad of the lessor, together with all equipment and appurtenances of every kind and nature whatsoever to the said railroad, belonging or appertaining.

SECOND: On the first day of December, 1907, and semi-annually thereafter on the first day of June, and the first day of December in each year during the term of this lease, the lessee will pay to the lessor as rent, for the half year ending on the last day of the month in which such rent is due and payable, the sum of \$70,000, together with an additional sum, equal to interest payable during the half year next preceding such rent day at the rate of 6% per annum, upon all expenditures made after the date hereof for the purchase by or on account of the lessor, of locomotives, cars and other equipment for use upon or in connection with the railroad hereby leased, or for the construction or acquisition of extensions, branches, terminals or additions to or betterments of the demised premises. The aggregate amount or all such additional sums so paid, shall be equal to simple interest on all such expenditures from the first [22] day of the month next succeeding their payment to the end of the term of this lease. It is expressly understood and agreed that the amount of such rental shall be appropriated and applied by the lessor to the payment of its obligations and liabilities other than such as are assumed by the lessee pursuant to the provisions hereof:

THIRD: The lessee will operate the said railroad

and will pay the expenses of operation, maintenance, repairs and renewals thereof, and all incidental expenses connected therewith, and the sums payable for taxes and assessments upon the demised premises.

FOURTH: The lessor agrees that it will repay to the lessee, with interest at the rate of 6% per annum, all sums advanced by the lessee upon the request of the lessor, or necessarily expended by the lessee for additions or betterments to the demised premises, or for the purchase of locomotives, cars and other equipment for use thereon or in connection therewith, and the lessee shall be entitled to retain and pay to itself out of the rental payable to the lessor hereunder whatsoever shall be owing to it from the lessor, as aforesaid, including any interest which shall be justly due or owing to the lessee in respect thereof.

FIFTH: In case default shall be made by the lessee in the fulfillment of its obligations hereunder, and such default shall have continued for the period of ninety days after written notice of such default shall have been given by the lessor, its successors or assigns, to the lessee, its successors or assigns, then and in any such event the lessor, its successors and assigns, may thereupon and without demand or other formality, enter upon and take possession of all and singular the demised premises with their appurtenances, and it or they thereafter shall be entitled to hold, retain and enjoy the same as of its original estate therein and notwithstanding such entry, the lessee, its successors and assigns, shall be liable to the lessor its successors and assigns, [23] for any and all damages in anywise resulting from the non-fulfill-

ment of its agreement hereunder, or from any wrongful acts or omissions of the lessee, its successors or assigns, in respect to the demised premises or any part thereof.

SIXTH: This lease may at any time be terminated by sixty days' notice in writing by either party to the other; and it is further agreed between the parties hereto that if at any time it appears that by the operation of this agreement either party is being benefited at the expense of the other, then this agreement shall be revised and changed so that such will not be its operation, and if the parties hereto cannot agree upon the changes necessary to that end, then each party shall appoint one arbitrator and the two arbitrators so chosen shall choose a third arbitrator, and the award and decision in writing of such arbitrators, or a majority of them, shall be binding upon the parties hereto, and this agreement shall be revised and changed in accordance with such award and decision and as so revised and changed shall be duly executed in writing by the parties hereto.

IN WITNESS WHEREOF, each of the parties hereto has caused these presents to be signed by its president or a vice-president and its corporate seal to be hereunto affixed, attested by its secretary or an as-

sistant secretary, the day and year first above written.

THE SNAKE RIVER VALLEY RAIL-
ROAD COMPANY.

By WM. CROOKS,
Vice-president.

[Seal] Attest: W. R. LITZENBERG,
Asst. Secretary.

THE OREGON RAILWAY & NAVIGA-
TION COMPANY.

By W. D. CORNITH,
Vice-president.

[Seal] Attest: JOS. HELLEN,
Asst. Secretary. [24]

State of Oregon,
County of Multnomah,—ss.

On this 10th day of August, A. D. 1907, before me, personally appeared Wm. Crooks and W. R. Litzenberg, to me known and known to me to be the president and assistant secretary respectively of The Snake River Valley Railroad Company one of the corporations that executed the within and foregoing instrument and severally acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned and on oath severally stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] C. G. SUTHERLAND,
Notary Public in and for Oregon. [25]

State of New York,
County of New York,—ss.

On this 29th day of August, A. D. 1907, before me, appeared W. D. Cornith and Joe Hellen, both to me personally known, who being severally duly sworn did say that he, the said W. D. Cornith is the vice-president, and that he, the said Jos. Hellen is the asst. secretary of The Oregon Railroad & Navigation Company, one of the corporations that executed the foregoing instrument and that the seal affixed to said instrument is the corporate seal of said corporation *and that the seal affixed to said instrument is the corporate seal of said corporation* and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors and said W. D. Cornith and Jos. Hellen severally acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this the day and year in this, my certificate written.

[Seal]

L. ELWELL,

Notary Public New York County. [26]

THE SNAKE RIVER VALLEY RAILROAD
COMPANY.

Portland, Oregon, Dec. 17, 1910.

To the Oregon Railroad and Navigation Company:

Notice is being served on you herewith of the termination of the lease existing between you and this company, dated the 29th day of June, 1907, in accord-

ance with the provisions of the lease.

This company respectfully request that you waive the requisite notice for the termination of said lease, under the provisions thereof, and that the said lease be cancelled by mutual agreement between you and this company, to take effect at 11:59 o'clock p. m. Pacific time, on December 23, 1910.

This company hereby notifies you that it is willing to agree to the termination of said lease at said time.

THE SNAKE RIVER VALLEY RAILROAD COMPANY.

(Signed) By L. F. STEEL,
Assistant Secretary. [27]

THE SNAKE RIVER VALLEY RAILROAD COMPANY.

Portland, Oregon, December 17, 1910.

To the Oregon Railroad and Navigation Company:

You are hereby notified that The Snake River Valley Railroad Company hereby elects to, and does, terminate that certain lease dated the 29th day of June, 1907, by and between The Snake River Valley Railroad Company, Lessor, and The Oregon Railroad and Navigation Company, Lessee, wherein and whereby the said The Snake River Valley Railroad Company did lease to said The Oregon Railroad and Navigation Company for the term of five years from the first day of July, 1907, the railroad of said The Snake River Valley Railroad Company, together with the equipment and appurtenances of every kind and nature whatsoever to said railroad belonging or appertaining, said termination of said lease to take effect sixty (60) days from the date hereof, to wit, on

February 15th, 1911, in accordance with the sixth paragraph of the said lease.

THE SNAKE RIVER VALLEY RAIL-
ROAD COMPANY.

[Seal]

By L. F. STEEL,
Assistant Secretary. [28]

MEMORANDUM OF AGREEMENT made and entered into this 23d day of December, A. D. 1910, by and between The Snake River Valley Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and The Oregon Railroad and Navigation Company, a like corporation ;

WITNESSETH that, for and in consideration of the sum of One Dollar paid by the first party above named to the second party, receipt whereof is hereby acknowledged, the said parties hereto agree that that certain lease dated the *w*9th day of June, 1907, be, and the same hereby is, cancelled and terminated to take effect at 11 :59 o'clock P. M. Pacific Time, on December 23d, 1910.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed by their proper officer thereunto duly authorized the day and year first above written.

THE SNAKE RIVER VALLEY RAIL-
ROAD COMPANY.

By J. P. O'BRIEN.
Vice-president.

[Seal]

Attest: L. F. STEEL,
Secretary.

[Seal]

Attest: W. W. COTTON,
Assistant Secty.

Service of the within answer by receipt of certified copy thereof, is hereby admitted at Portland, Oregon, this 5th day of June, 1914.

W. A. ROBBINS,

Of Attorneys for Plaintiff.

Filed June 5, 1914. A. M. Cannon, Clerk. [29]

And afterwards, to wit, on the 13th day of June, 1914, there was duly filed in said Court and Cause a Demurrer to Answer, in words and figures as follows, to wit: [30]

[Demurrer to Answer.]

Comes now The Snake River Valley Railroad Company, the plaintiff above named, and demurs to the further and separate answer and defense of the defendants herein, upon the ground and for the reason that said further and separate answer and defense does not state facts sufficient to constitute a defense against said plaintiff in this action.

W. W. COTTON,

A. C. SPENCER,

W. A. ROBBINS,

Attorneys for Plaintiff, The Snake River Valley
Railroad Company.

United States of America,
District of Oregon,—ss.

I, W. A. Robbins, one of the attorneys for the plaintiff in the above-entitled action, hereby certify that I prepared the foregoing demurrer and that the same is, in my opinion and best judgment, well founded in law and is not filed for the purposes of delay.

Dated at Portland, Ore., this 13 day of June, 1914.

W. A. ROBBINS.

Service by copy admitted at Portland, 6/13, 1914.

E. A. JOHNSON,

Solicitor for Defendants.

Filed June 13, 1914. A. M. Cannon, Clerk. [31]

And afterwards, to wit, on Monday, the 3d day of August, 1914, the same being the 25th judicial day of the regular July term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit: [32]

[Order Sustaining Demurrer, etc.]

This cause was heard upon the demurrer of the plaintiff to the answer filed herein and was argued by Mr. W. A. Robbins, of counsel for the plaintiff, and by Mr. Everett A. Johnson, Assistant United States Attorney, of counsel for the defendants; on consideration whereof, IT IS ORDERED AND ADJUDGED that said demurrer be, and the same is hereby, sustained; and on motion of said defendants it is further ORDERED that they be, and are hereby, allowed ten days from this date, within which to further plead. [33]

And afterwards, to wit, on the 3d day of August, 1915, there was duly filed in said Court and Cause an Opinion, in words and figures as follows, to wit: [34]

[**Opinion.**]

MEMORANDUM BY BEAN, District Judge.

These four cases are brought against the Collector of Internal Revenue to recover sums of money paid by the respective plaintiffs under protest as corporation taxes, under the Act of Congress of August 5, 1909. The plaintiff in each case had leased its road to another company which was operating it during the taxing year in question, and therefore in my opinion was not doing business within the meaning of the Corporation Tax Act. I am unable to distinguish the cases from that of *McCoach vs. Minehill Railroad Company*, 228 U. S. 295, in which the Supreme Court held that a railroad company which has leased its railroad to another company operating it exclusively, and which maintains its corporate existence and collects and distributes to its stockholders the rentals from the lessee, and also dividends from investments is not doing business within the meaning of the Corporation Tax Act.

The demurrers to the answers will therefore be sustained.

Filed August 3, 1914. A. M. Cannon, Clerk. [35]

And afterwards, to wit, on the 12th day of January, 1915, there was duly filed in said court and cause the Election of Defendants to stand upon their answer, in words and figures as follows, to wit:
[36]

[Election of Defendants to Stand upon Their Answer.]

Come now M. A. Miller, Collector of Internal Revenue of the United States for the District of Oregon, and David M. Dunne, the above named defendants, by E. A. Johnson, Assistant United States Attorney for Oregon, and attorney for defendants above named, and show unto the Court that they are unable to further amend their answer heretofore in the above entitled cause filed and by this Honorable Court on the 3d day of August, 1914, held insufficient upon demurrer of plaintiff, and by reason thereof hereby elect to stand upon their answer heretofore filed as aforesaid.

Dated at Portland, Oregon, this 11th day of January, 1915.

E. A. JOHNSON,
Attorney for Defendants.

United States of America,
District of Oregon,—ss.

Due and legal service of the within election of defendants to stand upon answer is hereby accepted this 11th day of January, 1915.

A. C. SPENCER,
Of Attorneys for Plaintiff.

Filed January 12, 1915. G. H. Marsh, Clerk. [37]

And afterwards, to wit, on the 12th day of January, 1915, there was duly filed in said court and cause a Motion for Judgment of the Pleadings, in words and figures as follows, to wit: [38]

[Motion for Judgment on the Pleadings.]

Comes now the plaintiff, the Snake River Valley Railroad Company, and moves the Court for a judgment on the pleadings in favor of the plaintiff herein, upon the grounds and for the reasons that the pleadings are insufficient to sustain a different judgment, notwithstanding any evidence *with* might be produced, and this Court has heretofore sustained plaintiff's demurrer to defendants' further and separate answer and defense, and said defendants have failed and declined to amend said further and separate defense or further plead, and the answer as it now stands admits and leaves undenied all of the material allegations of the complaint, but denies only the legal conclusions contained in said complaint, more particularly as follows, to wit:

I.

Paragraph I of the answer, which is an allegation that plaintiff is a corporation organized under the laws of the State of Oregon and is the owner of a line of railroad extending from Wallula, Washington, in a general northeasterly direction to the town of Grange City, in said State, is admitted.

II.

The answer admits Paragraph II of the complaint, which is an allegation that M. A. Miller is the present

Collector and David M. Dunne former Collector of Internal Revenue.

III.

The answer admits Paragraph III of the complaint, except that it denies plaintiff's legal conclusion that it, the plaintiff, has not, since June 29, 1907, carried on any business in connection with the operation of a railroad, and has not been engaged in doing or carrying on any business whatsoever.

IV.

The answer admits Paragraph IV of the complaint except that it again denies that plaintiff has not since June 29, 1907, [39] been engaged in doing business and denies that the taxing year ended June 30, 1911, and denies that said taxes were illegally and erroneously assessed and collected.

V.

The answer admits Paragraph V with the exception that it denies plaintiff's legal conclusion that said taxes were wrongfully and illegally collected from the plaintiff.

W. W. COTTON,

A. C. SPENCER,

W. A. ROBBINS,

Attorneys for Plaintiff.

United States of America,
District of Oregon,—ss.

I, W. A. Robbins, one of the attorneys for the plaintiff, hereby certify that the foregoing Motion is not interposed for the purpose of delay, and that in

my opinion same is meritorious and well founded in law.

W. A. ROBBINS,

One of the Attorneys for Plaintiff.

Service admitted at —, 1/12, 1915.

E. A. JOHNSON,

Solicitor for Defts.

Filed January 12, 1915. G. H. Marsh, Clerk. [40]

And afterwards, to wit, on Monday, the 8th day of February, 1915, the same being the 85th judicial day of the regular November, 1914, term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit: [41]

In the District Court of the United States for the District of Oregon.

No. 6338.

SNAKE RIVER VALLEY RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

M. A. MILLER, Collector of Internal Revenue of the United States for the District of Oregon, and DAVID M. DUNNE,

Defendants.

Judgment Order.

February 8, 1915.

Now at this time this matter coming on regularly to be heard upon plaintiff's motion for a judgment

on the pleadings in favor of the plaintiff, and it appearing to the Court that the pleadings are insufficient to sustain a different judgment, notwithstanding any evidence which might be produced, and this Court has heretofore sustained plaintiff's demurrer to defendant's further and separate answer and defense, and said defendants have failed and declined to amend said further and separate defense or further plead, and the answer as it now stands admits and leaves undenied all of the material allegations of the complaint, but denies only the legal conclusions contained in said complaint, and it further appearing to the Court that said Motion should be granted, it is therefore.

CONSIDERED, ORDERED AND ADJUDGED that plaintiff's motion for a judgment on the pleadings is hereby granted and that plaintiff do have and recover of and from the defendants herein, and each of them, the sum of eight hundred seventy dollars and seventy cents (\$870.70) together with interest thereon from June 27, 1911, and for plaintiff's costs and disbursements taxed and allowed at the sum of \$20.85 dollars, and that execution issue therefor. [42]

And afterwards, to wit, on the 15th day of March, 1915, there was duly filed in said Court and cause a Petition for Writ of Error, in words and figures as follows, to wit: [43]

[Petition for Writ of Error.]

Comes now M. A. Miller, Collector of Internal Revenue of the United States, for the District of

Oregon, and David M. Dunne, defendants herein, and say that on or about the 8th day of February 1915, this Court entered judgment herein in favor of the plaintiff and against these defendants, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors which defendants file with this petition.

WHEREFORE, these defendants pray that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals for said circuit.

E. A. JOHNSON,

Attorney for Defendants.

Filed March 15, 1915. G. H. Marsh, Clerk. [44]

And afterwards, to wit, on the 15th day of March, 1915, there was duly filed in said court and cause an Assignment of Errors, in words and figures as follows, to wit: [45]

[Assignment of Errors.]

The defendants above named, in connection with their petition for a writ of error herewith filed, make the following assignment of errors which they aver occurred in the proceedings and judgment had and rendered in said cause, to wit:

I.

That the Court erred in sustaining the demurrer of plaintiff to the answer of defendants filed in the above-entitled cause.

II.

That the Court erred in not overruling the demurrer of the plaintiff to the answer filed by the defendants in the above-entitled cause.

III.

That the Court erred in holding that the answer of defendants filed to the complaint of plaintiff in the above-entitled cause failed to plead a sufficient "doing of business" by plaintiff corporation within the year beginning January 1, 1910, and ending December 31, 1910, [46] to bring plaintiff company within the purview of the provisions of section 38 of act of Congress approved August 5, 1909, and to warrant the collection of the tax upon the net income of plaintiff corporation for that year as in said act of Congress provided.

IV.

That the Court erred in entering judgment for plaintiff and against defendant for the recovery of the moneys prayed for in the complaint of plaintiff.

V.

That the Court erred in entering judgment for plaintiff and against defendants for costs in the above-entitled action.

WHEREFORE, defendants pray that the said judgment be reversed.

E. A. JOHNSON,

Attorney for Defendants.

Filed March 15, 1915. G. H. Marsh, Clerk. [47]

And afterwards, to wit, on Monday, the 15th day of March, 1915, the same being the 13th judicial day of the Regular March term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit: [48]

[Order Allowing Writ of Error.]

On this 15th day of March, 1915, the above-named defendants appearing by E. A. Johnson, their attorney, and filing herein and presenting to the Court their petition praying for the allowance of a writ of error and assignment of errors intended to be urged by them and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Now, on consideration thereof, the Court does allow the writ of error as prayed in the petition of defendants, without bond of defendants, it appearing that the above-entitled cause is one in which the United States, and not the record defendants, is the real party in interest in said cause, and this appeal being taken by direction of the Department of Justice of the United States of America.

R. S. BEAN,

Judge of the District Court.

Filed March 15, 1915. G. H. Marsh, Clerk. [49]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writ of error, and in obedience thereto, do hereby certify that the foregoing pages numbered from 8 to 49, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case in which the Snake River Valley Railroad Company, a corporation, is plaintiff and defendant in error and M. A. Miller, Collector of Internal Revenue of the United States for the District of Oregon, and David M. Dunne are defendants and plaintiffs in error, as the same appear of record and on file at my office and in my custody, and I herewith return the said transcript of record into the United States Circuit Court of Appeals with the original writ of error and citation in said cause;

And I further certify that the cost of the foregoing transcript is Nine and 20/100 Dollars, and that the same has been charged against the United States in my account for fees.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Portland in said District this 25th day of March, A. D. 1915.

[Seal]

G. H. MARSH,
Clerk. [50]

[Endorsed]: No. 2588. United States Circuit Court of Appeals for the Ninth Circuit. M. A. Miller, Collector of Internal Revenue of the United States for the District of Oregon and David M. Dunne, Plaintiffs in Error, vs. Snake River Valley Railroad Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed March 29, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.